

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
DTE ELECTRIC COMPANY for)	
the reconciliation of power supply cost)	Case No. U-17680-R
recovery costs and revenues for the)	
12-month period ended December 31, 2015.)	
_____)	

At the July 12, 2017 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

Procedural History

On March 31, 2016, DTE Electric Company (DTE Electric) filed an application, with supporting testimony and exhibits, requesting approval of its reconciliation of power supply cost recovery (PSCR) costs and revenues for the 12-month period ended December 31, 2015, pursuant to 1982 PA 304 (Act 304), MCL 460.6j. DTE Electric's 2015 PSCR plan was approved in the January 19, 2016 order in Case No. U-17680.

A prehearing conference was held on June 6, 2016, before Administrative Law Judge Dennis W. Mack (ALJ). The ALJ granted petitions for leave to intervene filed by the Michigan Department of the Attorney General (Attorney General) and the Michigan Environmental Council (MEC). The Commission Staff (Staff) also participated in the proceedings.

An evidentiary hearing took place on January 11, 2017, at which pre-filed testimony and exhibits were bound into the record and cross-examination took place. On February 10, 2017, initial briefs were filed by DTE Electric, the Staff, the Attorney General, and MEC. On March 3, 2017, reply briefs were filed by DTE Electric, the Staff, and MEC. The record consists of 303 pages of transcript and 76 exhibits.

Proposal for Decision

The ALJ provided a detailed explanation of the testimony and positions of the parties on pages 5-25 of the Proposal for Decision (PFD), which will not be repeated here. The ALJ identified the following disputed issues requiring resolution: (1) whether, as MEC proposed, the Commission should find that DTE Electric committed its coal units in an uneconomical manner; (2) whether, as MEC proposed, the Commission should find that DTE Electric failed to adequately explain the variance between forecasted and actual generation between 2011 and 2015; (3) whether, as MEC proposed, the Commission should reconsider its approval of the Reduced Emissions Fuel (REF) project and consider imposing new conditions, and should further find that DTE Electric has not adequately explained the benefits of the resold coal transactions made through the REF project; (4) whether, as the Attorney General argued, DTE Electric has improperly calculated interest on over- or underrecoveries; and (5) whether the Commission should approve the Staff's proposed \$13.45 million disallowance for the PSCR portion of the Severstal payment¹ for electricity DTE Electric billed, collected, and ultimately refunded. No party took exception to the PFD's

¹ In its July 9, 2015 order in Case No. U-17663, the Commission determined that DTE Electric had overbilled a non-residential customer referred to as Severstal Dearborn, LLC (Severstal), a company that later became AK Steel, for a period of more than six years from February 2008 through April 2014. There, the Commission determined that Severstal was entitled to a \$19.651 million refund plus interest calculated at 7% per annum. It is this Commission-approved refund that is referred to throughout this order and the PFD as the "Severstal payment."

recommendations regarding issues (1) through (4). The Commission finds the PFD's findings and conclusions regarding those issues to be well-reasoned and adopts the PFD's findings, analysis, and conclusions on those issues. The remaining contested issue, regarding the Staff's proposed disallowance of the PSCR portion of the Severstal payment, is discussed below.

The ALJ summarized the positions of the parties regarding this issue, and noted that MEC, the Attorney General, and the Staff all supported a disallowance of the \$13,450,310 Severstal payment. The ALJ first discussed the Attorney General's position that including the Severstal payment in the PSCR reconciliation calculation would improperly charge other 2015 PSCR customers for overbilling that occurred from 2008 through 2014, and would constitute unlawful retroactive ratemaking. Using a different methodology for calculating the interest on the Severstal payment, the Attorney General recommended that the Commission disallow the \$13,450,310 Severstal payment and determine the total PSCR overrecovery to be \$29,529,012. The ALJ next noted that the Staff argued the payment was the result of the utility's imprudent and unreasonable actions and supported this assertion by presenting corroborating testimony. Specifically, Staff witness Gretchen Wagner, an Auditor in the Commission's Act 304 Reconciliations Section, asserted that, had DTE Electric complied with the Mich Admin Code R 460.3603 (Rule 603) and conducted an inspection within 60 days of the installation of its metering equipment, it would have discovered the billing error shortly after installation. *See* PFD, p. 23, referencing Ms. Wagner's testimony at 2 Tr 301-302. The Staff further asserted that Mich Admin Code R 430.3305 requires the multiplier to be displayed on the face of the meter and that, because the error was the result of an incorrect multiplier, the qualified person conducting the inspection under Rule 603 would have "easily caught the error." *Id.*, *citing* 2 Tr 302; Exhibits S-3, S-4. The ALJ summarized the Staff's position as indicating that, to allow DTE Electric to recover

the amount overbilled in this proceeding would reward the utility for unreasonable and imprudent actions. Thus, the Staff sought a disallowance of the Severstal payment and requested that the Commission conclude that the PSCR overrecovery should be \$29,527,496 including interest.

In reaching a recommendation, the ALJ began by explaining that the PSCR portion of the Severstal payment, or \$13,450,310, was the amount that DTE Electric identified in Case No. U-17663 as representing the PSCR impact of the six years of overbilling. The ALJ also noted the utility's position that the one-time adjustment that DTE Electric seeks in this case "is consistent with" the Commission's PSCR treatment of a refund that DTE Electric received from Consumers Energy Company (Consumers) for overpayments it made for a number of years because of a billing error in Case No. U-17097-R. DTE Electric argued that, in its June 30, 2015 order in Case No. U-17097-R, the Commission allowed Consumers to recover the payment through the PSCR reconciliation process as a cost of providing power. The ALJ concluded that DTE Electric's proposal to include the PSCR portion of the Severstal payment in this case does not constitute retroactive ratemaking given the Commission's past treatment of refunds and payments arising from billing errors in Case Nos. U-17097-R and U-16890-R. Thus, the ALJ found that the Attorney General's argument about unlawful retroactive ratemaking lacked merit. Similarly, based on the Commission's past treatment of refunds and payments arising from billing errors in Case Nos. U-17097-R and U-16890-R, the ALJ further disagreed with the Attorney General's position that it was inequitable and improper for the utility to recover from 2015 PSCR customers billing errors that took place from 2008 through 2014.

Despite his rejection of the Attorney General's arguments in support of the disallowance, the ALJ continued by distinguishing the facts surrounding the billing error issues presented in Case Nos. U-17097-R and U-16890-R and the facts surrounding the billing errors that resulted in

the Severstal payment at issue here. According to the ALJ, in those previous cases, the error was made by a third party other than the utility, and the parties to those cases promptly made arrangements for reimbursement upon discovery of the error. Thus, the ALJ noted that the Commission allowed the utility to include the payment in PSCR costs because the error was not in Consumers' control. In contrast to those cases, the ALJ reasoned that here, DTE Electric was the party responsible for the billing error because the error resulted from the utility's unreasonable and imprudent failure to inspect the meters within 60 days of their installation as the Commission's rules, specifically Rule 603, requires. PFD, p. 37. The ALJ notes the utility's admission in the testimony of Kenneth Johnston, DTE Electric's Manager of Community Lighting, that DTE Electric failed to strictly follow the metering inspections that the Commission's Technical Standards for Electric Service require. The ALJ also referred to Mr. Johnston's testimony regarding the field work done to prepare Severstal to become a retail electric full-service customer and how the meter installation work was completed without interrupting the customer's operations, as well as the reasons for that installation methodology. More specifically, the ALJ quoted testimony that DTE Electric followed the installation methodology that it did because Severstal refused to de-energize the electric service and refused to grant DTE Electric access and control of the potential and current transformers utilized at the substation. *Id.* The ALJ also referenced the utility's testimony that it had limited opportunities to safely perform the Commission-required meter inspections and the fact that the monetary impact to the customer affected DTE Electric's installation methodology and precluded safe inspection of the meters after installation. PFD, p. 38. The ALJ summarized DTE Electric's position that the billing error was not the result of imprudent or unreasonable actions on the part of the utility, and that the Severstal payment should be included in its PSCR expenses. *Id.*

The ALJ observed that DTE Electric's witnesses disagreed with Ms. Wagner's characterization in her testimony that the Severstal payment amounts to a "reward." The utility instead argued the adjustment is the result of a reversal of previously reconciled PSCR base and factor revenues and R10 revenues refunded to Severstal and represents the reduced PSCR sales volumes that DTE Electric experienced as a result of the error. The ALJ explained that the Staff does not dispute that the adjustment is a PSCR expense and is not seeking to punish the utility for overbilling but rather to preclude recovery under MCL 460.6j(12) based on its assessment that the expense resulted from the utility's unreasonable and imprudent actions. Likewise, the ALJ observed that DTE Electric is not seeking a reward but rather to recover a PSCR expense it claims it is entitled to under the same provision, MCL 460.6j(12).

In reaching a recommendation, the ALJ first determined that, even though DTE Electric failed to meet its burden to establish in its application that the adjustment was the result of reasonable and prudent actions, and that the Staff correctly characterizes the information that DTE Electric provided in its application concerning the payment as "scant," DTE Electric nevertheless cured the deficiency in its application with the evidence it entered through rebuttal testimony. PFD, pp. 39-40. The ALJ admonished the utility by indicating that it is incumbent upon the utility to document all aspects of its case in its case-in-chief as opposed to waiting for a party to raise a concern and then responding in rebuttal particularly when seeking a "unique" adjustment expense like the Severstal payment. *Id.* Reaching a decision on the merits, the ALJ opined that the record is devoid of any evidence that DTE Electric took any affirmative steps to comply with the Commission-required inspection set forth in Rule 603. *Id.*, p. 40. The ALJ reasoned that, rather than doing nothing, DTE Electric should have informed the Commission that it was unable to inspect the meters to ensure they were properly installed and operating consistent with its

obligations under Rule 603. *Id.* The ALJ further determined that, in taking no proactive steps, one of the purposes of Rule 603, i.e. ensuring the meters were operating properly, was defeated. PFD, p. 41. The ALJ further concluded that, had DTE Electric complied with that Commission rule, it would have discovered the billing error and rectified it by April 1, 2008. According to the ALJ, DTE Electric's failure to comply with Rule 603 instead allowed the error to perpetuate until April of 2014 when an inspection confirmed that the meters were not properly operating. The ALJ agreed with the Staff that the \$13,450,310 PSCR expense that DTE Electric seeks to recover in this proceeding was the result of its unreasonable and imprudent actions, and that the adjustment should not be allowed under MCL 460.6j(12). Thus, the ALJ determined that the Staff's proposed overrecovery of \$29,527,496 including interest should be used as DTE Electric's beginning balance for its 2016 PSCR reconciliation. *Id.*

Exceptions and Replies

DTE Electric takes exception to the ALJ's recommendation that the Commission should disallow the PSCR portion of the Severstal payment. Each of the legal grounds addressed in DTE Electric's exception, the Staff's replies to the arguments in the exception, and the Commission's consideration and decision are discussed by topic below.

Collateral Estoppel

DTE Electric first argues that the doctrine of collateral estoppel bars the Commission from approving the Staff's proposed disallowance. According to the utility, the Commission's July 9, 2015 order (July 9 order) in Case No. U-17663 already determined how the PSCR portion of the Severstal payment would be treated. DTE Electric further argues that it is also dispositive that the Staff, in Case No. U-12478, recommended that DTE Electric recover the securitization-related charges consistent with DTE Electric's methodology for calculating the refund owed to Severstal.

Thus, DTE Electric argues that the Commission should reject the Staff's proposed \$13.45 million disallowance under the doctrine of collateral estoppel.

The Staff replies that the issues decided in the Commission's July 9 order in Case No. U-17663 are distinct from the issues addressed in this case because Case No. U-17663 concerned a complaint that Severstal filed alleging a billing error. As such, the Staff argues that the issues decided in Case No. U-17663 included whether there was a billing error, the extent of the error, and how much, if any should be refunded. According to the Staff, the Commission in its July 9 order in Case No. U-17663 "said little about the impact its decision would have on PSCR factors." Staff's replies to exceptions, p. 12. In contrast, the Staff explains that this case is a PSCR proceeding where the Commission is being asked to decide how its decisions in the July 9 order in Case No. U-17663 impact PSCR factors and whether DTE Electric should be allowed to recover from other customers lost revenues due to the refund. According to the Staff, because this is a different issue decided under different circumstances, the doctrine of collateral estoppel articulated in *Pennwalt Corp v Pub Serv Comm*, 166 Mich App 1, 7-9; 420 NW2d 156 (1988) does not apply. The Staff further argues that, even if the Commission were to determine that *Pennwalt* does apply here, the Commission still has the discretion not to apply the doctrine of collateral estoppel. The Staff explains that it is appropriate to revisit the circumstances surrounding Case No. U-17663 to decide how the Commission's July 9 order affects PSCR factors. Staff's replies to exceptions, pp. 13-14.

Regarding DTE Electric's argument that the issues the Commission decided in Case No. U-12478 govern the cost recovery at issue in this case, the Staff argues that the Commission's orders in that case do not dictate the outcome in this case because this is a different type of proceeding decided under different circumstances. The Staff explains, by way of background, that

the Commission, in 2000, authorized DTE Electric (then Detroit Edison) to securitize up to \$1.774 billion of regulatory assets and other qualifying costs with the proviso that DTE Electric was required to file periodic true-ups and to request any needed adjustments to its securitization charge and tax charge. According to Staff, the Commission committed to quickly reviewing, within 45 days after a request for an adjustment, the computations contained in the proposed adjustments prior to their implementation. Staff argues that, in DTE Electric's most recent securitization true-up, DTE Electric included a \$(2,330,784) "billing dispute reserve" placeholder for the anticipated impact of the Commission's decision in Case No. U-17663 on DTE Electric's securitization bond and associated tax charges. DTE Electric agreed to refund any difference between the final resolution and the amount reserved in the Severstal billing dispute placeholder. Thus, the Staff explains that, in Case No. U-12478, no one contested DTE Electric's ability to recover the securitized portion of the Severstal refund. In contrast, the Staff maintains that this PSCR reconciliation case presents the Commission with the "first real opportunity" to decide whether it should allow DTE Electric to recover all of the Severstal refund. Staff's replies to exceptions, p. 15. According to the Staff, it does not matter that the Commission permitted DTE Electric to recover the securitized portion of the Severstal refund in Case No. U-12478 because the issue was never litigated in that case. In contrast, the Staff maintains that both the Attorney General and Staff oppose the recovery of the PSCR portion of the Severstal payment in the present case. The Staff further asserts that, in light of the testimony and evidence in this case that DTE Electric acted imprudently, the Commission should not allow DTE Electric to recover the PSCR portion of the refund.

Moreover, the Staff distinguishes securitization true-ups, which are limited in duration and scope, from PSCR reconciliations. Specifically, the Staff explains that securitization true-ups are

ex parte filings designed to “ensure the expected recovery of amounts sufficient to timely provide all payments of debt service and other required amounts and charges in connection with the securitization bonds.” Staff’s replies to exceptions, p. 16, quoting the November 2, 2000 order in Case No. U-12478. In such cases, the financing order and securitization charges authorized in the order are “irrevocable and not subject to reduction, impairment, or adjustment.” *Id.*, quoting MCL 460.10i(4). And, the Staff points out that the Commission’s review is usually completed within 45 days and is focused on “the arithmetic computations contained in the proposed adjustments.” *Id.* The Staff contrasts this type of case with the PSCR reconciliation case, which is a contested case where parties are encouraged to explore “the reasonableness and prudence of expenditures and the amounts collected pursuant to the [PSCR] clause.” *Id.*, quoting MCL 460.6j(12). The Staff points out that, here, the Commission can consider any issue regarding the reasonableness and prudence of expenses for which customers were charged if the issue was not considered adequately at a previously conducted power supply and cost review. Thus, the Staff argues that the Commission’s decision to allow DTE Electric to include in its securitization true-up a billing dispute reserve for the securitization portion of the Severstal payment does not require the Commission to allow DTE Electric to recover the PSCR portion of the Severstal payment in this case as they are different proceedings.

Having considered the parties’ arguments, the record, and the ALJ’s reasoning and conclusions in this case, the Commission agrees with the Staff that the doctrine of collateral estoppel does not prevent the Commission from disallowing the PSCR portion of the Severstal payment. The doctrine of collateral estoppel applies to “unappealed administrative determinations *that are adjudicatory in nature* and where . . . a method of appeal is provided.” *Consumers Energy Co v Pub Serv Comm*, 268 Mich App 171, 177; 707 NW2d 633 (2005), quoting

Champion's Auto Ferry v Pub Serv Comm, 231 Mich App 699, 712; 588 NW2d 153 (1998) (emphasis added).

“Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding.” *In re Consumers Energy Application for Rate Increase*, 291 Mich App 106, 122; 804 NW2d 574, 584 (2010), quoting *Leahy v Orion Twp*, 269 Mich App 527, 530, 711 NW2d 438 (2006), citing 1 Restatement Judgments, 2d, § 27, p. 250. In *Pennwalt*, *supra*, the Michigan Court of Appeals determined that the doctrines of *res judicata* and collateral estoppel were inapplicable to the fixing and regulating of rates by the Commission because this is a legislative function, not a judicial one. *See*, *Consumers Energy Co v Michigan Pub Serv Comm*, *supra*, 268 Mich App 177. “Even so, issues fully decided in earlier PSC proceedings need not be ‘completely relitigated’ in later proceedings unless the party wishing to do so establishes by new evidence or a showing of changed circumstances that the earlier result is unreasonable.” *In re Consumers Energy Application For Rate Increase*, *supra*, 291 Mich App 122, citing *Pennwalt*, *supra*.

The Staff is correct that the issue to be decided in this proceeding is whether DTE Electric should recover the PSCR portion of the Severstal payment. In contrast, the issue that was decided in the Severstal complaint case, or Case No. U-17663, was, as the Staff aptly noted, whether a billing error occurred, the extent of the billing error, whether Severstal was entitled to a refund, and the amount of any refund. The issue of whether DTE Electric could recover the refund from customers was not an issue decided in Case No. U-17663. Accordingly, the Commission finds that application of the doctrine of collateral estoppel is inappropriate.

Similarly, the Commission agrees with the Staff that the Commission's decision to approve a billing dispute reserve placeholder for the securitization portion of the Severstal payment in Case No. U-12478 is not dispositive here because the contested issue of whether DTE Electric should recover the PSCR portion of the Severstal payment at issue here was not decided or even litigated in that matter. Thus, there is no identical issue previously fully litigated in either the securitization true-up case, Case No. U-12478, or in the Severstal complaint case, Case No. U-17663. For all of the foregoing reasons, the Commission concludes that application of the doctrine of collateral estoppel articulated in *Pennwalt* does not apply here. Therefore, collateral estoppel does not prevent the Commission from disallowing the PSCR portion of the Severstal payment.

Act 304

DTE Electric next argues that the plain language of Act 304 prohibits the Commission from approving the Staff's proposed disallowance. DTE Electric asserts that the appropriate consideration in an Act 304 case is not whether, as the Staff alleges, the utility did not follow the Commission's billing rules, but whether the actual power supply costs during the 2015 PSCR year were reasonably and prudently incurred pursuant to MCL 460.6j(12). DTE Electric states that the language of MCL 460.6j(12) does not provide for a disallowance in a PSCR proceeding based on any violation of Commission billing rules as the Staff proposes here. Rather, that provision is strictly limited to power supply costs or expenses. DTE Electric argues that, if the Legislature intended to provide for a disallowance based on a violation of billing rules, then MCL 460.6j(12) would say so. Further, the utility maintains that the preponderance of the evidence shows it incurred all of its power supply costs during the 2015 PSCR year in a reasonable and prudent manner. It asserts that this fact is not disputed. Thus, it argues that the Commission should reject

the Staff's \$13.45 million disallowance because this Act 304 proceeding is solely concerned with whether DTE Electric's power supply costs were incurred through reasonable and prudent actions.

The Staff disagrees with DTE Electric's interpretation of the language in MCL 460.6j(12). Specifically, the Staff asserts that Act 304 governs "expenses for which customers were charged" which indicates that the Legislature was concerned not only about the expenses but how the expenses were passed on to customers. According to Staff, the Commission's billing rules are crucial to this inquiry because they govern how costs are passed on to customers. The Staff further argues that the reconciliation process requires a comparison of power supply revenues collected during the reconciliation period with amounts actually expensed. The Staff also points out that Act 304 gives parties the statutory right to evaluate, through discovery, the reasonableness and prudence of amounts collected. Thus, the Staff maintains that, if the Legislature did not want the Commission to consider amounts collected from customers and how they were collected, it would not have given parties the right to explore these issues in discovery. Additionally, the Staff points out that courts rarely conclude that the Commission is prohibited from considering issues when evaluating costs in reconciliation proceedings, and instead defer to the Commission's findings about the reasonableness and prudence of costs and revenues.

After considering Act 304 and the parties' arguments regarding its application to the PSCR portion of the Severstal payment, the Commission rejects DTE Electric's argument that Act 304 bars the Commission from approving the Staff's proposed disallowance. The PSCR reconciliation proceeding set forth in Act 304 requires the Commission to reconcile PSCR revenues and expenses for the 12-month period covered by a utility's PSCR plan. The 12-month period covered by DTE Electric's PSCR plan began on January 1, 2015 and ended December 31, 2015. The PSCR portion of the Severstal payment is not a power supply cost incurred during DTE Electric's

PSCR Plan year, but rather represents lost PSCR revenue from the cost of power supply consumed between the years 2008 and 2014. *See*, July 9 order in Case No. U-17663. Because the power supply was consumed and the associated PSCR revenues and expenses were received or incurred during a period outside of DTE Electric's PSCR plan year that is the subject of this proceeding, the \$13.45 million at issue here is not a PSCR cost of power supply that can be included in the reconciliation balance in this proceeding.

The Commission recognizes that, in reaching this determination, it is approving the Staff's requested disallowance while at the same time rejecting the Staff's assertion, and the ALJ's finding, that the lost PSCR revenue at issue here is a PSCR cost of power supply incurred during the PSCR plan year that resulted from imprudent and unreasonable actions. These lost PSCR revenues were clearly not a cost of power supply incurred during the PSCR plan year. Accordingly, it is unnecessary for the Commission to consider or discuss that line of inquiry as to whether DTE Electric's actions in failing to comply with Rule 603 by timely inspecting the installed metering equipment were imprudent or unreasonable.

The Commission also notes that, in reaching this determination, it rejects DTE Electric's assertions made during initial briefing, and alluded to on page 36 of the PFD, that the Commission's earlier orders in Case Nos. U-17097-R and U-16890-R require consistent treatment of the DTE Electric's requested adjustment for the PSCR portion of the Severstal payment at issue here. Those cases are factually distinct and the Commission's orders in those cases do not constitute binding legal precedent relevant to the Commission's determination of this issue.

In Case No. U-17097-R, DTE Electric was owed a refund because of an error in a software change at the International Transmission Company that provided incorrect calculations to Midcontinent Independent System Operator, Inc. (MISO). Due to the error, DTE Electric

experienced an overcharge to its purchased power and Consumers had an understatement. Consumers and DTE Electric entered into a settlement agreement where Consumers agreed to pay the amount of the overcharge in three quarterly installments during 2013, based on the amount overcharged to DTE Electric from October 2008 through March 2012. The agreed-to installments were recorded as a credit to PSCR costs of \$28,607,330. *See* DTE Electric's brief in Case No. U-17097-R, p. 10, summarizing the testimony of DTE Electric's Manager, Gross Margin, Matthew Krupinski at 2 Tr 44. As the ALJ recognized in this proceeding, there the error was made by a third party and did not involve a billing error made by DTE Electric. PFD, p. 36. In addition, this was a refund *owed* to DTE Electric and was not an amount of lost PSCR revenue. Thus, Case No. U-17097-R did not involve the factual scenario at issue here, where DTE Electric overbilled a non-residential customer for a period of six years and is attempting to include the PSCR portion of the customer overbill as a cost of power supply in a reconciliation balance.

In Case No. U-16890-R, Consumers learned from MISO that DTE Electric submitted a claim in 2012 alleging that an incorrect meter calculation associated with service to the Wyandotte system adversely affected DTE Electric's revenue. *See*, direct testimony of David Ronk, Consumers' Director for Electric Transactions and Wholesale Settlement, 2 Tr 233, in Case No. U-16890-R. After reviewing the metering error in accordance with MISO's alternate dispute resolution tariff provision, Consumers and DTE Electric resolved the claim through a settlement agreement. *Id.* Michigan Electric Transmission Company (METC) (or its affiliates), as the local balancing authority for the transmission system serving Consumers' distribution system, was determined to be the party responsible for the calculation of the energy interchange between Consumers' and DTE Electric's service territories. *Id.* From October 1, 2008 until April 1, 2012, METC miscalculated the residual energy for Consumers and DTE Electric due to an error in the

energy interchange calculation. *Id.* The error resulted in Consumers' customers paying for less energy than they actually used and DTE Electric's customers paying for more energy than they actually used. *Id.* Consumers made a billing settlement adjustment in 2012 in the amount of \$30.6 million. Consumers witness Stanley Hunley, a Principal Accounting Analyst in the Electric Revenue and Fuel Reconciliation section of Consumers' General Accounting Department, explained that this amount was booked in 2012 because Consumers was made aware of the error in 2012 and the Generally Accepted Accounting Principles required Consumers to establish a liability and book the corresponding expense in that year. *Id.*, at 2 Tr 279. Again, as in Case No. U-17097-R, this did not involve a customer billing error by Consumers, but rather involved an error by a third party, METC. Likewise, this case did not involve lost PSCR revenues due to a billing error over power consumed in previous PSCR plan years. Again, because these cases are factually distinct from the reconciliation proceeding at issue here, the Commission's treatment of these amounts in previous orders is not dispositive.

In summary, despite DTE Electric's arguments to the contrary, nothing in the language of Act 304, including the express language of MCL 460.6j(12), bars the Commission from approving the Staff's requested disallowance for a customer billing refund that is not a cost of power supply incurred in the 2015 PSCR plan year. Thus, the Commission finds that DTE Electric's argument lacks merit.

Unconstitutional Taking

DTE Electric next argues that the Staff's proposed \$13.45 million disallowance would effectively violate the Takings Clause of both the U.S. Constitution and Michigan Constitution because DTE Electric would not be properly compensated for the power supply costs that the company incurred and which the Staff does not allege were incurred through unreasonable or

imprudent actions. DTE Electric asserts, that, had the billing error never occurred, Severstal's fellow PSCR customers (rather than Severstal itself) would have been responsible for the \$13.45 million in PSCR costs that still would have been paid to DTE Electric, albeit over the period of February 1, 2008, through March 31, 2014. To remedy this loss of revenue, DTE Electric presented the testimony of DTE Electric's Principal Financial Analyst-Regulatory Economics within its Regularly Affairs department, Kelly Holmes, who noted Mr. Johnston's testimony in Case No. U-17663 that determined the "PSCR impact" of the Severstal payment to be \$13.45 million, and who further recommended that the Commission approve of a "one-time" PSCR adjustment in this amount to be reconciled by reducing the PSCR overrecovery balance by the amount of the adjustment. 2 Tr 95-99. According to the utility, failure to allow DTE Electric to treat the PSCR portion of the Severstal payment as proposed by Ms. Holmes would prevent DTE Electric from recovering reasonably and prudently incurred power supply costs.

The Staff replies that the Commission need not decide this issue because interpreting constitutional law is an exclusive function of the judicial branch. The Staff argues that, even were the Commission to decide this constitutional question, it should reject DTE Electric's argument because the utility applied the wrong standard and because the Staff's proposed disallowance would not rise to the level of a taking. The Staff explains that, in the realm of public utility law, the Takings Clause in the U.S. Constitution's Fifth Amendment has been interpreted to prevent regulators from approving utility rates that are so low they are confiscatory. The Staff asserts that, when deciding whether a rate is confiscatory or oppressive, courts consider the rate's actual overall impact and examine rate orders as a whole. Staff's replies to exceptions, p. 21. The Staff further argues that, DTE Electric has not attempted to argue that the overall PSCR reconciliation that the Staff supports is confiscatory or oppressive. Instead, the Staff maintains that the utility

focuses on one recommended disallowance and argues that the disallowance is confiscatory. According to the Staff, this is not the proper standard. Thus, just as the U.S. Supreme Court did in *Duquesne Light Co v Barasch*, 488 US 299, 308; 109 S Ct 609, 615; 102 L Ed 2d 646 (1989), the Staff asks the Commission to reject DTE Electric's request to examine rates (specifically the PSCR factor) on a "piecemeal" basis for the purpose of a Takings Clause analysis. Considering the PSCR factor as a whole, as the Commission is required to do, the Staff asserts that the "overall impact" of a rate order approving the proposed disallowance would not be a Takings Clause violation, because the total effect of the Staff's recommendation is not unjust or unreasonable.

After considering the parties' arguments on this issue, the Commission agrees with the Staff that this is the wrong forum for DTE Electric to assert a constitutional tort. If DTE Electric can establish that the PSCR factor is in fact confiscatory, it may request just compensation by alleging a constitutional tort in court. According to case law, this remedy precludes the Commission from rendering an administrative decision on the issue of whether the proposed disallowance is unconstitutional. *See, Champion's Auto Ferry v Pub Serv Comm*, 231 Mich App 699, 717-718; 588 NW2d 153 (1998). Moreover, the Staff is correct that DTE Electric has made no showing in this proceeding that the PSCR factor, as a whole, is confiscatory or oppressive. Accordingly, the Commission deems this argument abandoned.²

² "A party may not simply announce its position and then leave it to this Court to discover and rationalize the basis for its claims. Furthermore, a party may not give an issue cursory treatment with little or no citation of supporting authority." *In re Application of Ind. Mich. Power Co.*, 275 Mich App 369, 376; 738 NW2d 289 (2007) (citations omitted). Accordingly, this issue has been abandoned. *Id.*, citing *Yee v Shiawassee Co. Bd. of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Michigan Jurisprudence Against Punishing a Party Found Liable For Contract Damages

DTE Electric next argues that the Staff's proposed \$13.45 million disallowance is contrary to Michigan jurisprudence against punishing a party found liable for contract damages. The utility explains that all of Severstal's fellow PSCR customers benefited from DTE Electric's act of overbilling Severstal via reduced PSCR rates from February 1, 2008, to March 31, 2014, at Severstal's expense. DTE contends that, had the billing error not occurred, Severstal's fellow PSCR customers, rather than Severstal itself, would have been responsible for the \$13.45 million in PSCR costs that still would have been paid to DTE Electric during the period of February 1, 2008, through March 31, 2014. DTE Electric alleges that the end result is that PSCR customers received an interest-free loan from DTE Electric for a portion of the PSCR expense incurred to serve them during the 2008-2014 PSCR years. DTE Electric also notes that the billing error had no impact on the PSCR costs. It argues that Ms. Holmes' proposed treatment of the \$13.45 million PSCR overbill reverses the overbill in one lump sum from one PSCR customer, Severstal, to all of its fellow PSCR customers. And, the utility argues that this reversal should be recognized as having taken place in July 2015. Further, DTE Electric explains that its relationship with its customers is governed by tariffs that incorporate the Commission's billing rules. The utility argues that its tariffs and the Commission's rules and regulations establish the contractual relationship between DTE Electric and customers like Severstal. Further, DTE Electric asserts that it is a fundamental principle of contract law that the remedy for a breach of contract such as a Commission rule violation focuses on making the non-breaching party whole. The utility also argues that it is also a fundamental principle that contract law is geared toward the goal of compensating an injured party rather than punishing the breaching party. DTE Electric asserts that Severstal has been made whole consistent with the requirements of contract law. The utility

further maintains that, were the Commission to approve the Staff's proposed disallowance, this would "punish" the utility for violating the Commission's rules that govern the contractual relationship between DTE Electric and Severstal, thereby preventing DTE Electric from recovering \$13.45 million of power supply costs that the Staff does not otherwise dispute were incurred by reasonable and prudent actions. Thus, DTE Electric argues that the proposed disallowance violates fundamental principles of contract law that the non-breaching party should be made whole without punishing the breaching party.

The Staff replies that the Commission is not adjudicating a contract dispute between parties in the PSCR reconciliation proceeding. Rather, the Commission is reconciling power supply costs. Thus, the Staff asserts that principles of contract law do not apply here. The Staff further argues that the case DTE Electric cites to argue there is an implied contract, *Michigan Basic Prop Ins Corp v Detroit Edison Co*, 240 Mich App 524, 531; 618 NW2d 32 (2000), involves something completely different. The Staff likewise contends that the utility wrongly assumes the Staff is seeking to punish DTE Electric for violating the Commission's billing rules when that is not the case. Instead, the Staff argues it is using the billing rules as an aid to determine whether or not costs were collected imprudently and should be disallowed.

The Commission agrees with the Staff that the \$13.45 million proposed disallowance at issue in this PSCR reconciliation does not require it to examine principles of contract law because no utility customer is alleging breach of contract for violation of Commission rules or utility tariffs. Rather, as the Staff has correctly pointed out, this is a PSCR reconciliation proceeding under Act 304. The salient question for the Commission to determine is not whether a breach of contract has occurred but whether the PSCR portion of the Severstal payment constitutes a cost of power supply incurred during the utility's 2015 PSCR plan year that DTE Electric may include in its

overrecovery balance in this proceeding. As stated earlier, the Commission has determined that it is not. The Commission further disagrees with DTE Electric's portrayal of the proposed disallowance as an attempt to punish a utility for a rules violation. Instead the Commission views this proposed disallowance as a request to disallow an expense not properly included in this Act 304 proceeding. Likewise, the Commission agrees with the Staff that *Michigan Basic, supra*, is not applicable here because that case involved a different issue than the proposed disallowance discussed here. For these reasons, the Commission finds DTE Electric's application of contract law principles to this issue misplaced and rejects its argument as devoid of merit.

Unjust Enrichment

DTE Electric next argues that the Staff's proposed disallowance should be rejected under the theory of unjust enrichment. The utility explains that in order to establish a claim for unjust enrichment a party must show both that the defendant received a benefit from the plaintiff and a resulting inequity to the plaintiff because of the benefit retained by the defendant. DTE Electric further asserts that, when a claim for unjust enrichment is shown, the law implies a contract to prevent the unjust enrichment. According to DTE Electric, it is undisputed that the utility incurred its power supply costs through reasonable and prudent actions. Therefore, the company argues that it is entitled to recover such costs pursuant to Act 304. DTE Electric further asserts it would be inequitable to allow PSCR customers to retain the benefit of receiving power supply that the utility provided through reasonable and prudent actions without compensating the utility. Thus, it argues that the Commission should reject the proposed disallowance and adopt DTE Electric's proposed treatment of the PSCR portion of the Severstal payment as delineated by Ms. Holmes.

The utility further disputes Staff testimony suggesting that the utility would be "rewarded" were it allowed to recover the adjustment related to the billing error. According to DTE Electric,

the adjustment is not a reward but merely a reversal of previously-reconciled PSCR base and factor revenues and R10 revenues that have been refunded to Severstal pursuant to a Commission order. DTE Electric argues that a large source of the overbilled amount was power supply charges for electricity that the Commission determined was never delivered to Severstal. Therefore, it explains that reversal of this overbilled amount is a true up of revenues related to a manual cancel-rebill process and not a “reward.” The utility further asserts it has already incurred a significant penalty as a result of this billing error because the amount refunded to Severstal included an interest payment of approximately \$5.43 million based upon an interest rate of 7% on the overcharge amount through July 31, 2015, interest that the utility has not proposed to recover from its customers. In addition to the interest payment, the utility explains that there were numerous other surcharges in effect over the cancel-rebill period that have had their final reconciliation and for which DTE Electric has no realistic recovery mechanism. The utility alludes to a total of 17 different surcharges, both power supply and delivery-related, that were in effect over this period. DTE Electric explains that, had the billing error not occurred, DTE Electric would not only have recovered the \$13.45 million in PSCR-related revenues from other customers, but it would also have recovered all amounts from the previously reconciled surcharges from other customers as well. Thus, it asserts it is not being rewarded, but seeking to recover a legitimate power supply expense it incurred to serve customers. It emphasizes that it does not earn a return on any of its prudently-incurred power supply expenses because all power supply costs are a straight pass-through to customers.

In reply, the Staff argues that the Commission lacks the statutory authority to decide a claim in equity such as unjust enrichment. The Staff further argues that, if the Commission did possess this jurisdiction, the equities would favor PSCR customers who reasonably assumed they were billed

the right amounts. According to the Staff, it would not be fair to charge PSCR customers more to make up for DTE Electric's mistake, particularly when the mistake could have been avoided through reasonable and prudent actions. Thus, the Staff maintains that the principle of unjust enrichment does not help DTE Electric's case, and only serves to highlight how unfair it would be to penalize PSCR customers for the company's mistake.

The Commission agrees with the Staff that it lacks the statutory authority to decide a claim in equity like unjust enrichment. The Commission is not a court of general jurisdiction. Rather, it "...is an administrative body created by statute and the warrant for the exercise of all of its power and authority must be found in statutory enactments." *Sparta Foundry Co v Mich Pub Utilities Comm*, 274 Mich 562, 564; 267 NW 736 (1936). Accordingly, the Commission declines to consider the merits of this argument.

Proximate Cause of the Violation of the Commission's Billing Rules

DTE Electric next asserts that the Commission should not approve of the Staff's proposed disallowance because it is not appropriate to hold the "breaching party" responsible for damages that were not a "proximate result" of the breach. According to DTE Electric, it was Severstal and not DTE Electric that was the proximate cause of the utility's breach of the Commission's billing rules because Severstal hindered DTE Electric from taking certain actions that could have prevented the overbilling. Specifically, the utility points to testimony that Severstal refused to de-energize electric service or grant DTE Electric access to its instrument transformers when DTE Electric installed the revenue meters. Further, DTE Electric cites testimony that Severstal failed to provide or notify the utility of any opportunity to safely perform the necessary inspection of the revenue meters and their instrument transformers. Last, DTE Electric asserts that it was Severstal that provided the instrument transformer ratios to DTE Electric, which turned out to be the wrong

ratios. The utility further notes that the Staff, in its initial briefing, raised the factual allegation that DTE Electric could have talked to Severstal after the meters were installed or could have filed a complaint against Severstal. However, DTE Electric suggests the Staff is “engaging in pure speculation that either course of action would have altered the outcome.” DTE Electric’s exception, p. 16. Thus, it again argues the Commission should approve the proposed adjustment to PSCR revenue resulting from the Severstal refund.

The Staff replies that DTE Electric abandoned this argument in Case No. U-17663, and that, because the utility could have pursued it in that proceeding but did not, the Commission need not revisit it here. Moreover, the Staff argues that there is ample record evidence that DTE Electric was responsible for the billing error. The Staff asserts that DTE Electric admitted it did not comply with Rule 603.

The Commission, having considered DTE Electric’s proximate cause argument, concludes that it lacks merit. Significantly, DTE Electric was the utility that provided Severstal with electric service. DTE Electric was also the utility responsible for accurately billing Severstal for the electric service it provided. Moreover, it is undisputed that DTE Electric overbilled Severstal for more than six years beginning on February 1, 2008, and ending in April 2014. It was this act of overbilling Severstal that resulted in the Commission’s determination in Case No. U-17663 that a refund was in order. It was also established that DTE Electric should have, but failed to, inspect the newly-installed metering equipment within 60 days under Rule 603. Further, there was evidence that, had DTE Electric complied with this Commission rule, it would have detected the billing error from the start, instead of more than six years later. The Commission’s regulatory framework and particularly Rule 603 requires the utility to take proactive measures and find ways to conduct the inspection within the time period provided in that rule. Waiting until such a time as

Severstal might contact DTE Electric to inform the utility when an inspection could occur does not appear to be compliance with Rule 603. Ultimately, it was DTE Electric that billed Severstal improperly and this billing error was the cause of the refund and the PSCR lost revenues.

Regardless, this line of inquiry about the true cause of the billing error is of little relevance here because, as the Staff has pointed out, DTE Electric's liability for the refund was already established in the Commission's July 9 order in Case No. U-17663. What is being determined in this PSCR reconciliation is not, as DTE Electric suggests, which entity is truly responsible for the Severstal payment, but rather, whether the requested adjustment should be included in the PSCR overrecovery when it represents lost PSCR revenue from a time period preceding the PSCR plan year. Accordingly, the Commission is not persuaded that this line of argument has merit or is dispositive.

ALJ's Reliance on Objections to Direct and Rebuttal Testimony by Utility Witnesses

DTE Electric next argues that the Commission should reject the proposed disallowance because the Staff's procedural arguments against DTE Electric's proposed treatment of the PSCR portion of the Severstal payment lack merit. In response to the Staff's procedural argument that Mr. Johnston's rebuttal testimony should have been offered along with Ms. Holmes' direct testimony, DTE Electric argues that the Staff conceded it never filed any motion to strike. The utility also explains that the Staff stipulated to the entry of both Ms. Holmes' direct testimony and Mr. Johnston's rebuttal testimony into the evidentiary record without any objection. DTE Electric asserts that if the Staff had any objection to the scope of the company's direct testimony or rebuttal testimony on this issue, it was waived. DTE Electric further contends that Mr. Johnston's rebuttal testimony was properly admitted because it was responsive to Ms. Wagner's direct testimony. The utility also argues that the Staff wrongly relies on the Commission's order in Case No. U-11726

because that case was factually distinct. There, DTE Electric presented scant evidence in support of its position. Here, however, DTE Electric points out it has presented substantially more evidence than the Staff in support of the company's position. DTE Electric further argues that, had the Staff really felt that DTE's use of rebuttal testimony was a "litigation tactic," the Staff could have filed a motion for entry of surrebuttal testimony opposing Mr. Johnston's rebuttal testimony pursuant to Mich Admin Code, R 792.10427(3). According to the utility, the Staff's failure to do so forecloses its insinuations that there was anything improper about the filing of Mr. Johnston's rebuttal testimony. Last, DTE Electric argues that the case the Staff cited in its initial brief, *Dillon v Lapeer State Home & Training Sch*, 364 Mich 11; 110 NW2d 588 (1961), does not really stand for the proposition that the Staff says it does. In *Dillon*, the Michigan Supreme Court merely held that the evidentiary record as a whole, which included direct, cross, and redirect examination testimony, did not contain substantial, material, and competent evidence to support an administrative agency's decision. DTE Electric explains that the Court, in *Dillon*, never considered whether a particular witness's direct testimony was insufficient.

In addition, DTE Electric asserts that, regardless of the Staff's arguments against the utility's "litigation tactics" of keeping testimony out of the record until rebuttal, the issue is moot because DTE Electric should not have been required to re-litigate the Severstal complaint here. The company also maintains that both its application and Ms. Holmes' direct testimony require the Commission to apply its determination that Severstal was owed a refund in Case No U-17663 to this 2015 PSCR reconciliation.

Finally, DTE Electric argues that it presented more than sufficient testimony and exhibits to support its application in this case. It further argues that it cannot divine or foretell every issue that a prospective intervenor is going to raise at the time it files its case-in-chief. The company

states that, if it possessed such imaginary power, it would not need to file any rebuttal testimony. The utility further notes that Commission proceedings provide for discovery, rebuttal testimony, evidentiary hearings, and motions for surrebuttal testimony or adjournments. And, it alleges that the Staff in this case failed to make its case against DTE Electric's proposed treatment of the PSCR portion of the Severstal payment.

The Staff replies by asserting that DTE Electric's direct case was insufficient but that the Staff did not prevail over its evidentiary arguments because the ALJ concluded DTE Electric cured the deficiency in its case-in-chief by filing rebuttal testimony. Further, the Staff points out that it never took exception to the ALJ's finding in this regard because the Staff prevailed on other grounds. The Staff nevertheless argues that, because DTE Electric raised the issue again in its exceptions, the Staff reiterates that DTE Electric's direct case was insufficient. Thus, it urges the Commission to adopt the ALJ's recommendation that, in the future, DTE Electric "document all aspects of its case in its case-in-chief, as opposed to waiting for a party to raise a concern." PFD, pp. 39-40.

The Commission agrees with the Staff that no party filed exceptions challenging DTE Electric's evidentiary support for its case-in-chief or the ALJ's determination that DTE Electric cured any deficiency in its direct case with its rebuttal testimony. Accordingly, the Staff waived any opportunity to revisit this argument at this stage in the proceeding. The Commission nevertheless agrees with the ALJ's recommendation in the PFD that "it is incumbent for [DTE Electric] to document all aspects of its case in its case-in-chief, as opposed to waiting for a party to raise a concern and respond in rebuttal, particularly when it seeks an adjustment of a 'unique' expense like the Severstal Payment." PFD, pp. 39-40. The Commission agrees that, to the extent DTE Electric is able to anticipate a disputed issue in a PSCR reconciliation proceeding, such as a

requested adjustment to an under- or overrecovery reconciliation balance, the utility has the obligation to support its position on a disputed issue in its case-in-chief. In fact, in every PSCR reconciliation case, the company bears the burden of presenting sufficient evidence demonstrating its costs are reasonable and prudent power supply costs and must further establish, by a preponderance of the evidence, that those reasonable and prudent power supply costs were incurred during the plan year. Accordingly, the Commission adopts the ALJ's instruction to DTE Electric that it document all aspects of its case in its case-in-chief.

DTE Electric proposed a 2015 PSCR net overrecovery of \$15,430,979. Factoring in the Staff's proposed disallowance for the Severstal payment of \$13,450,310 and the resulting change to the interest calculation, the Commission finds that DTE Electric experienced a cumulative 2015 PSCR overrecovery of \$29,527,496, inclusive of interest.

THEREFORE, IT IS ORDERED that:

A. The application for a power supply cost recovery reconciliation for calendar year 2015 filed by DTE Electric Company is approved, as modified by this order.

B. DTE Electric Company's net overrecovery balance of \$29,527,496, inclusive of interest, shall be reflected as the company's 2016 power supply cost recovery reconciliation beginning balance.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any person desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Sally A. Talberg, Chairman

Norman J. Saari, Commissioner

Rachael A. Eubanks, Commissioner

By its action of July 12, 2017.

Kavita Kale, Executive Secretary